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ABSTRACT

Construction management is utilized when a school district engages a firm to coordinate a total project. The construction management seeks to save an owner time and cost primarily through better contractor coordination and project management. These services may include the planning and design phases of the project as well as the actual construction of the facility. State laws regarding construction management are placed in categories according to whether construction management is authorized, apparently authorized, not authorized, or not addressed. An examination of the status of construction management for public school districts throughout the country reveals a mixed picture. The construction of educational facilities is clearly within the purview of the state legislatures. Generally, this state responsibility is delegated to the local school districts. While the responsibility is delegated, so too is the observance of public bid statutes. Within the past few years, many states have moved toward more flexible approaches to how school districts may construct educational facilities. Public policy-makers are beginning to realize that the public may well be protected through a construction management project delivery system. (MLF)

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Construction Management for Educational Facilities: Professional Services' Procurement and Competitive Bid Statutes

ED268670

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Public school administrators are under increasing pressure to construct and renovate their facilities in the most timely and cost-effective manner. As project funding is often limited by a variety of constraints, educators have begun to examine alternative construction procurement techniques. One such method, construction management (CM), is being used with varying degrees of success by school districts throughout the country.

Briefly, CM is utilized when a school district engages a firm to coordinate a total project with the objective of representing the district's best interests. CM, developed as an alternative to the traditional public building process, seeks to save an owner time and cost primarily through better contractor coordination and project management. These services may include the planning and design phases of the project as well as the actual construction of the facility.

The CM firm is responsible for exercising highly-skilled professional judgment and possessing technical expertise in areas such as: 1) material design and selection, 2) cost estimates and budgets, 3) schedules and coordination, 4) supervision of construction, and 5) certification of contractor payments. The typical contractual relationship between the school board and the CM firm is similar to that with the architect/engineer. The board then makes awards to multiple prime contractors under competitive bid rules.

CM minimizes or eliminates the use of a general contractor in administering the separate multiple contracts. Under such an arrangement, the CM firm receives a professional fee from the school district. During a project's design and construction phases the CM

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firm performs certain services that are similar to traditional architectural services along with the work of the resident architect's representatives. These CM services often include coordination of architects and engineers, contract administration, payment control, and reporting to the district.

Numerous cases have upheld the practice of contracting with architects and engineers outside public bid observances.[1] Where one is "highly and technically skilled in a science or profession it would be poor judgment to bid where the lowest bidder might also be the least capable and most inexperienced."[2]

As a general rule, contracts for personal or professional services by a public body with a private firm or individual are not governed by public competitive bidding laws and need not be submitted for public competitive bids.[3] The Indiana court of appeals examined CM for schools in *Attlin Construction, Inc. v. Muncie Community Schools,*[4] and concluded:

> [I]ts rationale is that competitive bidding laws are applicable to public works construction contracts only where the material and work must conform to specifications allowing the performance of the contract to be measured by relatively objective standards. Consequently, it is presumed that the legislature intended the lowest price to be the ultimate determining factor in awarding the contract. However, with the public contracts calling for professional and/or personal services requiring aesthetic, business or technical judgment, and/or professional or scientific skills and experiences, it is assumed that the legislature could not have intended the lowest price to be the ultimate determining factor as the performance of the contract can not [sic] be evaluated objectively. Because the nature of personal and/or professional service contracts makes it unlikely that bids would provide any advantage to the public body in awarding the contract, advertising for such bids would be undesirable, impossible or impractical.[5]
>
> We do not believe the Legislature contemplated that our bidding statute would govern contracts for professional services . . . similar to those of an architect or engineer . . . . These contracts are not susceptible to objective evaluation of their performance so as to make the price the ultimate determining factor. Furthermore, the nature of such contracts makes advertisement for bids impractical

1. Annot., 15 A.L.R.3d 733 (1967).
2. Cobb v. Pasadena City Bd. of Educ., 285 P.2d 41 (Cal. Ct. App. 1955).
3. Annot., 15 A.L.R.3d 733 (1967).
4. 413 N.E.2d 281 (Ind. Ct. App. 1980).
5. *Id.* at 287.

and undesirable. Where, as here, a contract requires the construction manager to perform duties similar to that of an architect or engineer, the rationale for exempting the architect or engineer's contract from the bidding laws is equally applicable to the construction manager's contract.[6]

It is important to understand that the nature of the CM contract may influence the courts. In *City of Inglewood-Los Angeles County Civic Center Authority v. Superior Court*,[7] the California Supreme Court ruled that a CM arrangement was not exempt from the state's competitive bid procedures. *City of Inglewood* can be distinguished from *Attlin*. In *City of Inglewood* the CM contract provided that the CM firm guarantee the maximum price of the construction project. The court in *Attlin* noted that the *City of Inglewood* arrangement was "closely akin to the traditional lump sum general construction contract rather than to a contract for the services of an engineer or an architect. Consequently, the management contract could be evaluated by objective criteria making the price the ultimate determining factor."[8]

Generally, school districts are authorized under statute to construct educational facilities by awarding a contract to the firm with the lowest and best bid. The public welfare is then arguably protected in having one entity responsible for construction of the facility at the lowest possible cost to the public. This could suggest that CM does not protect the public well-being in that it is "a number of separate tradesmen performing separate tasks . . . . " The CM method " . . . will not ensure completion of any project. Neither will it ensure completion at a specified contract price."[9]

Because states must protect the health, safety, and welfare of their citizens in general, and school children in particular, only licensed professionals may design public school facilities. Designing a facility for another, or the furnishing of plans and specifications for a facility, constitutes the practice of architecture (or engineering) and requires an architect's (or engineer's) license. However, it is generally held that the supervision of the actual construction of a facility is not, of itself, the practice of architecture and hence no such license is required.[10]

Yet the practice of construction supervision is considered by some

6. *Id.* at 290.
7. 500 P.2d 601 (Cal. 1972).
8. Attlin, 413 N.E.2d at 291.
9. *Id.* at 292.
10. Annot., 82 A.L.R.2d 1013 (1962).

states to be the practice of architecture and/or engineering.[11] Supervision of construction obviously requires discretion in the exercise of expertise and professional judgment and closely resembles those professional services. However, if strictly confined to supervision and not design, no architectural or engineering license would be required unless so stipulated by statute.

When competitive bid and professional procurement statutes are silent as to CM, school districts are left to rule-making by state agencies and interpretation by state courts. As a few already do, state legislatures may specifically authorize CM as an acceptable contractual arrangement. Undoubtedly, though, emerging construction techniques such as CM were not contemplated with the passage of many bid statutes.

Construction Management Authorized

Indiana specifically allows school corporations to engage CM firms without public bid. As discussed above, in *Attlin* the state court of appeals considered whether a public school corporation under the bid statutes was authorized to let a contract for CM services.[12] The court's majority found that CM services were very similar to architectural and engineering services.[13]

The strong dissenting opinion questioned the majority's threshold assumption: "That is whether the school corporation can legally enter into a contract with a construction manager."[14]

> "Construction managers" are not named and neither may such be implied. Thus the school corporation may not employ one or contract with one. Had the General Assembly wished to grant school corporations the power to contract for such services it could easily have done so. The omission is indicative of its desire not to do so.[15]

California's Attorney General issued a 1974 opinion specifically authorizing a community college district to secure through noncompetitive means CM services.[16] The Attorney General's opinion relied on the following statutory guidance:

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11. See, e.g., *infra* note 115.
12. Attlin, 413 N.E.2d at 282.
13. *Id.* at 291.
14. *Id.*
15. *Id.* at 292.
16. 57 Op. Att'y Gen. 417 (1974).

> The legislative body of any public or municipal corporation or district may contract with and employ any persons for the furnishing to the corporation or district special services and advice in financial, economic, accounting, engineering, legal, or administrative matters if such persons are specially trained and experienced and competent to perform the special services required.[17]

The opinion also relied on *Cobb v. Pasadena City Board of Education*,[18] wherein the state court of appeal allowed the contracting for "special services" not subject to competitive bids.[19] The opinion distinguished *Cobb* from *City of Inglewood*[20] in which the CM contract included a "guarantee of the outside price" for the project.[21] The Attorney General noted: "Under the District's plan . . . each subcontractor in a particular trade or area of expertise will bid on his part of the job directly to the District, just as if he were a general contractor submitting a bid to the District. We do not find anything legally improper with such a plan."[22]

In a separate but related opinion, the Attorney General stated that "a construction manager need not be licensed as a contractor or as an architect."[23]

Iowa allows school districts to engage CM firms without public bid under a ten-year-old Attorney General's opinion.[24] The Attorney General noted, "The power to employ someone other than an architect to superintend the construction of a school house has been recognized in this state for some time."[25] The Attorney General clearly stated, "Although there appears to be no specific authority authorizing the school district to employ a construction manager under a Construction Management Agreement using multiple contracts for the work to be accomplished, the power to do so may be fairly implied."[26] Recognizing the concept of multiple prime contracts awarded to the lowest bidders, the Attorney General found "[T]here is no prohibition in the statutes or otherwise, against letting bids for specific parts of the construction at different times as the building progresses."[27]

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17. Cal. Gov't Code § 53060 (West Supp. 1984).
18. 285 P.2d 41 (Cal. Ct. App. 1955).
19. *Id.* at 44.
20. 500 P.2d 601 (Cal. 1972).
21. *Id.* at 604.
22. 57 Op. Att'y Gen. at 419.
23. 57 Op. Att'y Gen. 421 (1974).
24. Op. Att'y Gen. No. 74-5-15 (1974).
25. *Id.* at 532.
26. *Id.* at 531.
27. *Id.* at 532.

By virtue of an Attorney General's opinion, CM for schools is specifically allowed in Maryland.[28] If the CM firm is selected via a competitive bid process the contract is acceptable.[29] However:

> When it is not possible or feasible to prepare specifications or when such specifications ... would not support competition by sealed bids, it follows that the statutory requirement must, of necessity, be discarded .... [T]he Board of Education would nevertheless be duty-bound to adhere to its intent .... [A]t a minimum, this should include:
>
> 1. Public notice of the requirement for construction management services designed to reach the audience of potential offerors;
>
> 2. Providing to known potential offerors an explicit description of the services sought, minimum contractual requirements, and the criteria which will be employed as the basis of selection so that all offerors may compete on the same basis; and
>
> 3. Providing an adequate time within which offerors may submit their responses or proposals.[30]

Regarding the question of whether the CM firm could perform construction work itself, the Attorney General realized:

> [I]t would be improper to entertain bids from the construction manager or its affiliates for construction work on the project. In the context of its role as advisor to and agent of the school board, the construction manager becomes a de facto arm of the board, to whom it owes sole allegiance. To permit it to function as a construction contractor while at the same time charging it with the responsibility of monitoring performance and advising the school board with respect to such matters as compliance with specifications and the need for change orders is to create a situation fraught with conflicting interests. ... [S]uch a situation is to be avoided.[31]

Nevada's Local Government Purchasing Act,[32] which applies to

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28. 63 Op. Att'y Gen. 549 (1978).
29. *Id.* at 553.
30. *Id.* at 554.
31. *Id.* at 556.
32. Nev. Rev. Stat. ch. 332 (1983).

school districts,[33] requires that contracts for the construction of public buildings be awarded to the lowest responsible bidder.[34] Contracts for professional services are exempt from the competitive bid requirement.[35] The Nevada Attorney General has issued an opinion that states:

> County hospitals and other local government entities otherwise authorized by law to engage in public works projects may utilize construction management services for such projects and under NRS 332.115, which exempts contracts for professional services from competitive bidding requirements, contracts for construction management services need not be let by competitive bidding if a construction manager is used solely for consulting or coordinating purposes, but must be so let if the manager is made responsible for guaranteeing cost and construction of the project.[36]

Texas statutory law provides for competitive bidding for all school construction projects of $5,000 or more.[37] The statute excludes fees for "professional services rendered, including but not limited to architects' fees . . . ."[38] The Texas Professional Services Procurement Act[39] states:

> For purposes of this Act the term "professional services" shall mean those within the scope of the practice of . . . architecture . . . or professional engineering . . . or those performed by any licensed architect . . . or professional engineer in connection with his professional employment or practice.
>
> No state agency, political subdivision, county, municipality, district authority or publicly owned utility . . . shall make any contract for, or engage the professional services of . . . [an] architect . . . or registered engineer, or any group or association thereof, selected on the basis of competitive bids submitted for such contract or for such services to be performed, but shall select and award such contracts and engage such services on the basis of demonstrated competence and qualifications for the type of pro-

33. *Id.* at § 332.015.
34. *Id.* at § 332.065.
35. *Id.* at § 332.115.
36. Op. Att'y Gen. No. 209 (1977).
37. Tex. Educ. Code Ann. § 21.901 (Vernon 1984).
38. *Id.*
39. Tex. Rev. Civ. Stat. Ann. art. 664-4 (Vernon Supp. 1984).

fessional services to be performed and at fair and reasonable prices, as long as professional fees are consistent with and not higher than the published recommended practices and fees of the various applicable professional associations and do not exceed the maximum provided by any state law.[40]

The central question is whether CM constitutes professional services under Texas statutes. The Texas Attorney General issued an opinion that CM services were "personal,"[41] but did not address whether such services were "professional."[42] Commentators have argued that CM for schools would be upheld,[43] since Texas courts allow school districts broad discretion absent clear abuse.[44]

Alaska's education code authorizes CM for schools.[45] When state funds are appropriated for construction, fees for CM services are limited to 2% for an appropriation of $5 million or more, 3% for an appropriation between $500,000 and $5 million, and 4% for an appropriation of $500,000 or less.[46]

Colorado's 1981 Procurement Code[47] calls for the executive director of the state's department of administration to "promulgate rules providing for as many alternative methods of construction contracting management as feasible."[48] All political subdivisions, including school districts, are authorized to adopt all or any part of the code and its accompanying rules.[49] Procurement of such professional service is by competitive sealed proposal.[50]

Under Florida's Educational Facilities Act of 1981,[51] the state office of educational facilities construction "shall require [school district] boards to employ procedures for the design and construction of new facilities, or major additions to existing facilities, that will include, but not be limited to, the latest developments in construction."[52] Included is:

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40. *Id.*
41. Op. Att'y Gen. No. MW-530 (1983).
42. *Id.*
43. Cooper & Horton, *Competitive Bid Requirements for School District Contracts*, Tex. B.J. (Oct. 1983) at 1154.
44. *Id.* at 1156.
45. Alaska Stat. § 14.11.020(a) (Supp. 1984).
46. *Id.* at § 14.11.020(c).
47. Colo. Rev. Stat. § 24-101 thru § 24-112 (Supp. 1984).
48. *Id.* at § 24-105-101.
49. *Id.* at § 24-101-105(2).
50. *Id.* at § 24-103-203(1).
51. Fla. Stat. Ann. ch. 235 (West Supp. 1984).
52. *Id.* at § 235.211(2).

> Construction management — A process whereby a single or highly coordinated authority is responsible for all scheduling and coordination in both design and construction phases and is generally responsible for the successful, timely, and economical completion of the construction project.[53]

Under the Massachusetts state finance code,[54] CM is considered a recommended mode of procurement.[55] Its public building construction code,[56] which applies to school districts,[57] sets forth CM selection procedures.[58] Its public works construction code[59] calls for separate specifications for 18 classes of work, including plumbing, HVAC, and electrical.[60]

South Carolina's 1981 Consolidated Procurement Code,[61] which requires all political subdivisions to have adopted comparable procedures by 1983,[62] specifically recognizes CM for state agencies:

> "Construction management services" are those professional services associated with a system in which the using agency directly contracts with a professional construction manager to provide that group of management activities required to plan, schedule, coordinate, and manage the design and construction of a state project in a manner that contributes to the control of time, cost, and quality of construction as specified in the construction management contract.[63]
>
> It is the policy of this State to announce publicly all requirements for ... construction management ... services and to negotiate contracts for such services on the basis of demonstrated competence and qualification for the particular type of services required, and at fair and reasonable prices.[64]

The Utah procurement code applies to "local procurement units,"

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53. *Id.*
54. Mass. Ann. Laws ch. 29 (Michie/Law. Co-op. 1983).
55. *Id.* at § 7E.
56. *Id.* at ch. 7 §§ 30B-P.
57. *Id.* at § 30B.
58. *Id.* at § 30L.
59. *Id.* at ch. 149 §§ 44A-I.
60. *Id.* at § 44F.
61. S.C. Code Ann. tit. 11 ch. 35 (Law. Co-op. 1983).
62. *Id.* at § 11-35-50.
63. *Id.* at § 11-35-2910(3).
64. *Id.* at § 11-35-3210(2).

including school districts,[65] in the selection of "their agent or construction manager."[66] State rules and regulations must "provide for as many alternative methods of construction contracting management as determined to be feasible. These rules and regulations shall:"[67]

> (1) Set forth criteria to be used in determining which method of construction contracting management is to be used for a particular project;
>
> (2) Grant to the chief procurement officer or the head of the purchasing agency responsible for carrying out the construction project the discretion to select the appropriate method of construction contracting management for a particular project; and
>
> (3) Require the procurement officer to execute and include in the contract file a written statement setting forth the facts which led to the selection of a particular method of construction contracting management for each project.[68]

Virginia statute calls for competitive bidding on all school construction contracts if any state funds are involved.[69] To the extent adopted by school authorities through their procurement rules,[70] Virginia's 1982 Public Procurement Act[71] specifically permits CM to "coordinate and administer contracts for construction services for the benefit of the owner, and may also include, if provided in the contract, the furnishing of construction services to the owner."[72] Procurement of CM services is done by competitive negotiation:[73]

> Selection shall be made of two or more offerors deemed to be fully qualified and best suited among those submitting proposals, on the basis of the factors involved in the request for proposal, including price if so stated in the request for proposal. Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but need not be the sole determining factor. After

65. Utah Code Ann. §§ 63-56-2,-5 (Supp. 1983).
66. *Id.* at § 63-56-35.5.
67. *Id.* at § 63-56-36.
68. *Id.*
69. Va. Code § 11-41.1 (Supp. 1984).
70. *Id.* at § 11-35D.
71. *Id.* at § 11-35.
72. *Id.* at § 11-37.
73. *Id.*

> negotiations have been conducted with each offeror so selected, the public body shall select the offeror which, in its opinion, has made the best proposal, and shall award the contract to that offeror. Should the public body determine in writing and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified than the others under consideration, a contract may be negotiated and awarded to that offeror.[74]

It is interesting to note that CM services may include actual construction under Virginia law, contrary to the logic expressed by other states.

Construction Management Apparently Authorized

Oregon statute requires that all public contracts be let via competitive bid procedures.[75] The exception to this requirement can be found in the provision allowing the awarding of contracts for personal services.[76] In *Mongiovi v. Doerner,*[77] the state court of appeals allowed a county to retain a CM firm without public bid. "[T]here was no general contractor under the construction method used (called 'fast track')." As one witness explained:

> Well, it's not feasible to build on a fast track schedule without a construction manager because by definition under fast track you are not putting out a general contract .... [T]here is no general contractor who is responsible for all of the work under fast track because you put out the frame, you may put out the excavation separately, you put out the curtain wall or the exterior walls of the building, you put out one or more contracts for the interior finishes of the building, you put out a contract for the mechanical aspects of the building, the electrical aspects of the building, and all of these go out as ... separate contracts many of them at different times, and there's nobody except a construction manager who could tie that package together, so [the] fast track approach is not feasible without a construction manager there.[78]

The court went on to stress that the CM firm did not perform any construction. It was a party to a personal service contract "whereby

74. *Id.*
75. Or. Rev. Stat. § 279.015 (1983).
76. *Id.* at § 279.051.
77. 546 P.2d 1110 (Or. Ct. App. 1976).
78. *Id.* at 1113.

the county was purchasing professional services involving peculiar skills, knowledge and expertise. [The firm] was selected on the basis of [its] qualifications and prior experience."[79] Hence, the court ruled that the CM contract was "exempt from the statutory bidding and bonding requirements."[80] Because all political subdivisions are included in the statutory definition of "public agency,"[81] CM is likely allowed for Oregon schools.

A Pennsylvania statute and case apparently authorize CM for schools. Its education code requires separate bids for plumbing, HVAC, and lighting work on school construction projects.[82] In *Willman v. Children's Hospital of Pittsburgh*,[83] the commonwealth court endorsed CM for a county hospital project where "all trade or construction contracts were to be managed and executed by" the construction manager.[84] The same Municipal Authorities Act cited which authorized the county hospial authority also authorizes public school building authorities.[85]

The New York State Comptroller has ruled that "a municipality may enter into a contract to engage a construction management firm for . . . coordination of a public works project . . . and such a contract would be free from competitive bid requirements as the services involved contain the elements of professional services."[86] New York's general municipal law, which includes school districts in its coverage,[87] requires separate specifications, bids, and awards for plumbing, HVAC, and electrical work on all construction.[88]

Alabama's public contracts code pertains to school districts.[89] Its competitive bidding requirements do not apply to "contracts for the securing of services of . . . architects,. . . superintendents of construction, . . . engineers, . . . or other individuals possessing a high degree of professional skill."[90] Because employment contracts are covered elsewhere,[91] a superintendent in Alabama appears to be more a construction manager than an employed clerk of the works.

Delaware's state government code on public works contracts is

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79. *Id.*
80. *Id.*
81. Or. Rev. Stat. § 279.011.
82. Pa. Stat. Ann. tit. 24 § 7-751(a) (Purdon Supp. 1984-85).
83. 459 A.2d 855 (Pa. Commw. Ct. 1983).
84. *Id.* at 857.
85. See *supra* note 82 at tit. 53 § 306(A).
86. N.Y. Op. State Compt. 80-5 (1980).
87. N.Y. Gen. Mun. Law § 100(1) (McKinney Supp. 1983-84).
88. *Id.* at §§ 101(1), (2).
89. Ala. Code § 41-16-50(a)(1) (Supp. 1984).
90. *Id.* at § 41-16-51(a)(3).
91. *Id.* at § 41-16-51(a)(4).

expressly made applicable to school districts.[92] Under statute, a district "may retain the services of a general contractor, or other qualified person, firm or corporation to assist in cost estimation, economic design analysis and construction . . . ."[93] These are some of the functions performed by a construction manager, without using the terminology.

Illinois defines the practice of architecture to include "professional services such as . . . construction management . . . in connection with the construction of any . . . public buildings."[94] Under its local government code, public hearing commissions have the power to employ architects and "construction" experts.[95] School districts are included in this coverage.[96] School contracts for professional services are exempted from competitive bid statutes.[97] In *Gastaldi v. Reutermann*,[98] a state appellate court recognized thirty years ago that owners (such as school districts) could hire superintendents of construction who are not architects "for day to day, perhaps hour to hour, supervision of the construction which is separate and distinct from the architect's service."[99] If the architecture statute is taken literally, though, it would allow CM for Illinois schools only if performed by licensed architects.

New Jersey statutes seem to permit such activities as CM by licensed architects and engineers. "Professional services," not subject to competitive bidding,[100] are defined as:

> [S]ervices rendered or performed by a person authorized by law to practice a recognized profession and whose practice is regulated by law and the performance of which services requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training.[101]

New Jersey's public schools contracts law generally requires separate plumbing, HVAC, electrical, structural steel, and other con-

92. Del. Code Ann. tit. 29 § 6901(1) (Supp. 1983).
93. *Id.* at § 6903(f).
94. Ill. Ann. Stat. ch. 111 § 1204 (Smith-Hurd Supp. 1983).
95. *Id.* at ch. 85 § 1044(g).
96. *Id.* at § 1033(e).
97. *Id.* at ch. 122 § 10-20.21, § 34-21.3.
98. 104 N.E.2d 115 (Ill. App. Ct. 1952).
99. *Id.* at 117.
100. N.J. Stat. Ann. § 18:18A-5(a)(1) (West 1984).
101. *Id.* at § 18A:18A-2(h).

struction contracts.[102]

New Mexico's 1984 Procurement Code[103] calls for the contracting of professional services by all political subdivisions of the state [104] according to competitive sealed proposals. [105] These services include architectural, engineering, management analysis, and similar services.[106] CM for schools may be reasonably implied from the statutory language as an architectural/engineering service.[107]

Combining statutes which never specifically mention CM, North Carolina apparently authorizes CM for schools. Licensed architects, engineers, and general contractors may "administer [building] construction contracts."[108] School and other public building contracts must permit separate bids for HVAC, plumbing, electrical, general, and other appropriate work.[109]

Ohio specifically allows CM for counties by statute:

> In connection with the planning and construction of any public building project, the board may employ a construction project manager or consultant, and fix their compensation. Such construction project manager or consultant shall be expert and qualified in their respective fields.[110]

Ohio's public improvements law[111] requires separate bids for separate classes of work on school construction projects.[112] Thus CM for Ohio schools is implied.

Tennessee statutory language apparently allows CM for schools under a non-competitive bid process by architects and engineers:[113]

> Contracts by counties, cities, metropolitan governments, towns, utility districts and other municipal and public corporations of this state for . . . services by professional persons or groups of high ethical standards, shall not be based on competitive bids, but shall

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102. *Id.* at § 18A:18A-18.
103. N.M. Stat. Ann. § 13-1-1 thru § 13-1-172 (Supp. 1984).
104. *Id.* at § 13-1-67.
105. *Id.* at § 13-1-122.
106. *Id.* at § 13-1-76.
107. *Id.* at §§ 13-1-31,-55.
108. N.C. Gen. Stat. § 83A-13(b) (Supp. 1983).
109. *Id.* at § 143-128.
110. Ohio Rev. Code Ann. § 153.31 (Page 1984).
111. *Id.* at ch. 153.
112. *Id.* at § 153.50.
113. Tenn. Code Ann. § 62-6-102 (1980).

be awarded on the basis of recognized competence and integrity.[114]

In Wisconsin, a fifty-year-old state supreme court decision confuses already imperfect statutory language which apparently authorizes CM for schools. The definitions of architects and engineers include the "responsible supervision of construction."[115] School boards may contract with architects and engineers.[116] Wisconsin's municipality law, which includes school districts,[117] calls for separate plumbing, HVAC, and electrical contracts on public works.[118] That separation of work, coupled with the above definitions, seems to allow CM by licensed architects and engineers. Yet the state supreme court, in *Wahlstrom v. Hill,*[119] carefully distinguised "responsible supervision of construction" by architects and non-architects:

> The statute refers to the sort of supervision which an architect ordinarily gives. It cannot be construed to forbid all supervision except by a licensed architect. Every superintendent and foreman, and, in the main, every workman, must of necessity do his work in such a manner as to conform to the plans and specifications. The supervision that is necessary to performance is not the supervision that is ordinarily rendered by an architect. What the architect does is to ascertain whether the work has been done as planned. There is of necessity supervision of a sort which precedes that of the architect. The architect is responsible for seeing that the plans and specifications are carried out, not for the method by which the final result is achieved, unless the method adopted is one which will not permit of the result intended.[120]

Construction Management Not Authorized

Only Arizona has an Attorney General's opinion specifically prohibiting the use of CM for schools:

> [The] school district's proposal to use a construction management, rather than a general contractor, plan in the construction of school buildings would not comply with statutory requirements that there be a single responsible contractor and performance and pay-

114. *Id.* at § 12-4-106.
115. Wis. Stat. Ann. § 443.01 (West Supp. 1983).
116. *Id.* at § 120.13(9).
117. *Id.* at § 66.29(1)(a).
118. *Id.* at § 66.29(1)(b).
119. 252 N.W. 339 (Wis. 1934).
120. *Id.* at 341.

ment bonds in amounts equal to the full contract amount . . . .[121]

The Attorney General reinforced its opinion with one in 1983 which puts Arizona contrary to many states described above. Noting that the state's public buildings and improvements code[122] applied to school districts, the Attorney General stated that using multiple prime contractors "contravenes" the requirement for a single general contractor.[123]

Construction Management Not Addressed

CM for schools is not addressed by statute, case law, or attorney general opinion in Arkansas, Connecticut, District of Columbia, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, Rhode Island, South Dakota, Vermont, Washington, West Virginia, or Wyoming.[124]

Maine's public improvements code, which applies to school construction,[125] includes the traditional description of an employed clerk of the works:

> A clerk-of-the-works shall be employed to assist in the inspection of the construction of a public improvement when directed by the professional architect-engineer of record for the project. The budget for the public improvement shall include funding for the clerk. The clerk shall be hired through an open advertising and interview process by the architect-engineer. The clerk candidate recommended by the architect-engineer shall be subject to approval by both the owner and director before being hired. The clerk shall possess qualifications of education and experience in construction technology and administration compatible with the needs of the public improvement. The director may promulgate rules relative to this section.[126]

A fifty-year-old Minnesota Supreme Court case seems to allow only an employed clerk of the works for school projects. In *Krohnberg v. Pass*,[127] the court ruled that architect, engineer, and "superin-

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121. Op. Att'y Gen. No. 77-192 (1977).
122. Ariz. Rev. Stat. Ann. tit. 34 (Supp. 1983).
123. Op. Att'y Gen. No. 183-016 (1983).
124. Agency rules in some states undoubtedly address CM for schools and should be consulted.
125. Me. Rev. Stat. Ann. tit. 5 § 1741 (Supp. 1984-85).
126. *Id.* at § 1751.
127. 244 N.W. 329 (Minn. 1932).

tendent of construction" service contracts do not require competitive bids:

> The superintendent of construction was a personal representative of the school district. He watched the contractors to see that the work was done in accordance with the plans and specifications of the architects and engineers. It was not the intention of the statute that for such services there should be a public advertising for bids and a letting of the contract of employment to the lowest responsible bidder ....[128]

Summary

An examination of the status of CM for public school districts throughout the country reveals a mixed picture. The construction of educational facilities is clearly within the purview of the state legislatures. Generally, this state responsibility is delegated to the local school districts. While the responsibility is delegated, so too is the observance of public bid statutes.

Within the past few years, many states have moved toward more flexible approaches to how school districts may construct educational facilities. Relatively new management techniques, as successfully practiced in the private sector, appear to be increasingly commonplace. Intent on protecting public welfare, many legislatures have still accepted the fact that there are many different ways to build school facilities without necessarily resorting to the bidding of all services.

Public policymakers are beginning to realize that the public may well be protected through a CM project delivery system. Generally, educational administrators would agree that such statutory flexibility would enhance management prerogative and offer local school districts more discretion in securing the best educational facilities available within limited capital budgets.

128. *Id.* at 330-31.